

ORIGINAL

RECEIVED

PRESIDING OFFICER'S  
RULING NO. C2001-3/23

APR 9 10 45 AM '02

POSTAL RATE COMMISSION  
OFFICE OF THE CLERK

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, DC 20268-0001

Complaint on First-Class Mail Standards

Docket No. C2001-3

PRESIDING OFFICER'S RULING ON  
CARLSON MOTION CONCERNING DFC/USPS-9

(Issued April 9, 2002)

An unresolved discovery issue in this case is the extent to which the complainant — and, by extension, the public — should have access to disaggregated data on service performance and delivery results.<sup>1</sup> These data, requested by complainant Carlson in DFC/USPS-9, are commonly referred to as “point-to-point” and “point-specific” data.<sup>2</sup> Similar disclosure issues — and similar impasses — have arisen in connection with DFC/USPS-1, which seeks point-to-point volume data, and DBP/USPS-137(m-o), which seeks comparative point-to-point time-in-transit data.<sup>3</sup>

The Postal Service publicly releases some aggregate service performance data (nationally for ODIS and by performance cluster for EXFC). Based on longstanding

---

<sup>1</sup> See, e.g., Objection of the United States Postal Service to Interrogatory of Douglas Carlson, November 6, 2001; Douglas F. Carlson Motion for an Extension of Time to Respond to Postal Service Objection to DFC/USPS-9, November 19, 2001 and Douglas F. Carlson Revised Motion for an Extension of Time to Respond to Postal Service Objection to DFC/USPS-9 — Erratum, November 20, 2001; Reply of the United States Postal Service to Revised Motion of Douglas Carlson for an Extension of Time to Respond to Postal Service Objection, November 26, 2001.

<sup>2</sup> These data are generated by two of the Postal Service's regular reporting systems. The volume and point-to-point service performance data are generated by the Origin-Destination System (ODIS); the point-specific data are generated by the External First-Class (EXFC) reporting system. Postal Service managers use the First-Class Mail ODIS point-to-point volume data to plan and organize the First-Class Mail processing, transportation and other logistical operations among the 849,106 3-digit ZIP Code area pairs. Opposition of the United States Postal Service to Douglas Carlson Motion to Compel Response to DFC/USPS-1 (Postal Service Opposition), November 14, 2001 at 1-2.

<sup>3</sup> The Service asserts that DBP/USPS-137(m-o) seeks ODIS data that reflect time-in-transit between two 3-digit ZIP Code pairs for a recent postal quarter. It contends these data are commercially sensitive and privileged and, citing its DFC/USPS-9 pleadings, objects to disclosure of the data without adequate protective conditions. See Objections of the United States Postal Service to Interrogatories DBP/USPS-136(d-f) and 137(m-o). P.O. Ruling C2001-3/18 deferred a ruling on question 137(m-o). See also Postal Service Opposition.

policy, however, the disaggregated data that underlie composite figures have been withheld from public disclosure due to the Service's belief that they are confidential, commercially sensitive and proprietary. The Service invokes those claims here and, in lieu of full disclosure, moves for application of protective conditions. See Objection of the United States Postal Service to Interrogatory of Douglas Carlson (Postal Service Objection), November 6, 2001, at 2 and Reply of the United States Postal Service to Douglas F. Carlson Answer in Opposition to the Application of Protective Conditions to the Response to DFC/USPS-9 (Postal Service Reply), December 10, 2001. The proposed conditions would, among other things, strictly limit disclosure to participants in this case and to the confines of this case.<sup>4</sup> Complainant Carlson opposes protective conditions of any sort. He maintains, among other things, that the Commission "must ensure maximum public access" to this type of information so that he and other interested persons can communicate it to the public and members of Congress. Douglas F. Carlson Answer in Opposition to Postal Service Motion to Impose Protective Conditions on Disclosure of Data in Response to DFC/USPS-9 (Carlson Answer), December 3, 2001, at 5.

I. Scope and Nature of Data and Information at Issue in DFC/USPS-9

The DFC/USPS-9 data request, in terms of postal operations and geography, covers every 3-digit ZIP Code pair in the postal system where (a) the First-Class Mail service standard was changed from two days to three days in 2000 or 2001, and (b) at least one of the paired Codes is located in Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, New Mexico, Colorado, Montana, Wyoming or Texas. In terms of data and information, the interrogatory seeks, for each affected pair, the most recent available ODIS and EXFC data broken out to show on-time delivery percentage, average days to deliver, and proportion of mail delivered for the following delivery

---

<sup>4</sup> They also might entail the filing of portions of briefs and of the Commission's Opinion under partial seal. The Service moved for application of protective conditions such as those applied in P.O. Ruling R2001-1/5, October 31, 2001.

situations: two days; three days; and over three days. The question also asks for the same data for comparable periods in each of the two years prior to implementation of the service standard changes that underlie this complaint.

The statistical reliability of ODIS is not in issue, and the Service acknowledges that responsive data can be generated. Postal Service Objection at 1-2. Similarly, the statistical reliability of EXFC, by service standard, of aggregate destinating scores for participating performance clusters is not disputed; however, the Service asserts that EXFC is not designed to provide statistically valid estimates of specific point-to-point delivery performance *between* performance clusters. It says some of the requested data are publicly available, and can be provided; however, it says data on the percentage of mail delivered overnight, in two days, in three days, and more than three days by service standard for each performance cluster are not routinely published, and are considered as commercially sensitive as the ODIS data.<sup>5</sup> *Id.* at 2.

## II. Positions on Disclosure

*The complainant's position.* Mr. Carlson's position involves not only an emphasis on public interest aspects of disclosure, but issue-specific concerns as well. In particular, he notes that the Service has made improved consistency the primary justification for the service standard changes. He asserts: "Point-to-point ODIS and EXFC data will settle the question and establish whether postal customers' slower service is more consistent." Carlson Answer at 6. Moreover, Mr. Carlson contends that "*only* point-to-point performance data will allow an examination of whether the particular downgrades from two days to three days have improved consistency of delivery; aggregated national data will not." *Ibid.* (Emphasis supplied.) He claims that the Service's monopoly position over the letter portion of the First-Class Mail stream is a reason to require disclosure.

---

<sup>5</sup> The Service mentions overnight data in its argument, but DFC/USPS-9 does not request overnight data.

*The Service's position on disclosure.* The Service's core position is its traditional one: disclosure of point-to-point information could harm its commercial interests by providing competitors with valuable information concerning the relative degree to which various markets are susceptible to market penetration. Postal Service Objection at 2. The Service sees no inconsistency between this stance and competing considerations, such as its monopoly position over First-Class Mail letters and its statutory obligation to publicly report a measure of the quality of First-Class Mail delivery. It also suggests that the recent media and Congressional interest Mr. Carlson points to is the result of a publicity campaign generated by the complainant. *Ibid.*

In response to the argument that the monopoly position granted by the Private Express Statutes weakens its claim to protective conditions, the Service asserts that the protected mail stream is nevertheless subject to competition from a variety of sources, such as private delivery firms, messenger services, electronic funds transfer services, and internet service providers. It claims that public disclosure of the ODIS point-to-point data would provide these competitors with valuable information about the relative degree to which various origin-destination city pair markets or lines of traffic are susceptible to penetration. *Ibid.*

With respect to public accountability, the Service maintains that Congress, in 39 U.S.C. § 410(c)(2), extended special protection to the commercial interests of the Postal Service by exempting from public disclosure "information of a commercial nature ... which under good business practice would not be publicly disclosed." *Ibid.* It therefore argues that in establishing the Postal Service's various public service obligations, Congress also extended a strong measure of protection to the Postal Service's commercial interests, on par with that enjoyed by its private sector competitors. The Service contends that none of these competitors is known to routinely publicly disclose information on shipments they carry between various origin-destination pairs. *Id.* at 2-3. Furthermore, the Service asserts that section 410(c)(2) should be read in harmony with Commission rule 27(c), which allows all parties (including the Service) subject to discovery requests to assert evidentiary privileges, and to have those privileges

recognized through issuance of orders accompanied by appropriate protective conditions. *Id.* at 3. It emphasizes that its position here on protective conditions is consistent with its approach to responses to Congressional and General Accounting Office (GAO) requests for First-Class Mail ODIS volume and point-to-point time-in-transit data. *Ibid.* (fn. 2).

### III. Interests in Issue

Commission rule 27(c), as the Service notes, allows all parties subject to discovery requests to assert evidentiary privileges — such as those available for confidential, commercially privileged and proprietary data — and to have those privileges recognized through issuance of orders or rulings that authorize appropriate protective conditions. Assertion of a claim to protection, however, is not a guarantee that application of the requested protective conditions will be approved. In each instance, important interests must be balanced in reaching a conclusion on the appropriateness of granting the request.

A standard the Commission has articulated is whether the commercial sensitivity of the data outweighs any contribution the data would make to the public record in this proceeding. See P.O. Ruling R2001-1/128 at 3.<sup>6</sup> In general, the Commission has found that delivery service performance data of the type sought here is relevant to the issue of the value of postal services. This has led to rulings compelling the production of delivery performance data for Express Mail and Priority Mail, which are competitive services.

From the complainant's perspective, issues that lie at the heart of this case — such as whether consistency of service in the Western states is better as a result of the service standard change — can be fairly assessed only if no restrictions are placed on disclosure of the disaggregated data. In the view of the Postal Service, disclosure of

---

<sup>6</sup> This ruling cites several previous rulings on this topic, such as P.O. Ruling R94-1/22, June 3, 1994 and P.O. Ruling R90-1/29, June 19, 1990. Read together, these rulings set out a consistent position on the considerations that enter into the balancing test found applicable here.

selective service performance data without protective conditions would seriously harm its competitive position. Commission interests also enter into the equation, as it bears responsibility, under the Administrative Procedure Act, for providing a forum that allows all participants a full and fair public hearing on pertinent issues.

The considerations that enter into the balance here entail relatively straightforward policy, precedent and practices. A common thread is the assertion of competitive harm. To ensure adequate exploration of this claim, I requested examples of material or documentation supporting representations in the December 13, 2001 Declaration of Greg Whiteman. See P.O. Ruling C2001-3/14 (December 19, 2001). The Service promptly submitted this material under seal for *in camera* inspection.

I have carefully reviewed and evaluated participants' positions, including referenced citations to the material the Service provided in response to the interim ruling, agency precedent, statutory considerations, and case law. On balance, I conclude that disclosure on the terms the Service has proposed is not fully consistent with adequate due process in this case. Applying protective conditions to the disaggregated data sought in DFC/USPS-9 would inappropriately compromise the inquiry at hand. While comparisons critical to evaluation and discussion could be made under protective conditions, open assessment and discussion would not be possible. Regardless of whether there is any media interest in this matter, this approach would fundamentally frustrate the Commission's responsibility to conduct a fair proceeding and, if appropriate, issue a report that is truly public.

The protection that has been accorded to similar data in the past has been duly considered in reaching this conclusion. Disaggregated service performance data for competitive services has been shielded from public disclosure. However, neither the arguments put forward by Postal Service counsel nor the supporting information provided to corroborate Mr. Whiteman's affidavit, present any plausible risk that First-Class volumes could be threatened by the disclosures of information on service levels achieved between a limited number of city pairs, hundreds of miles apart, for which service standards had been changed. Case law does not indicate that there is a *per se*

right to withhold these data from public scrutiny. The privilege asserted here is a qualified one. Thus, the Service's interest in protective conditions is entitled to considerable weight, but must yield when other valid considerations — such as those found to exist here — clearly outweigh that interest. Under the circumstances of this case where, among other things, the competitive harm claim is found to be highly speculative, protective conditions would unjustifiably operate as a bar to open discussion and analysis of claims central to this case. Accordingly, disclosure of these data is warranted. The terms of disclosure are described in part III.

*Considerations related to protective conditions.* Mr. Whiteman states that the data are considered proprietary because they could be used by a competitor to damage the competitive position of the Postal Service. Whiteman Declaration at 1. He suggests, for example, that a competitor could use disaggregated ODIS and EXFC to explore the feasibility of targeting specific markets for online bill presentment and payment services to compete with First-Class Mail. *Id.* He also maintains that point-specific days-to-deliver data could be used by a postal competitor to identify with great specificity the strengths and weaknesses of the Postal Service's share of the market for matter that can be transmitted via First-Class Mail, thereby allowing that competitor to target its marketing and other resources to areas of vulnerability, or to avoid competition where the Postal Service is perceived strongest. *Id.* at 2.

These claims — similar in effect to those advanced by declarants Smith and Prescott in this case — do not withstand scrutiny.<sup>7</sup> Even if it is conceded, for purposes of this ruling, that the letter portion of the First-Class Mail stream is being challenged by numerous sources, there is no convincing evidence that marketers of those services can deal harm by scrutinizing a limited subset of city-pair two- and three-day service performance. This is particularly true since the Service has indicated that it did not reduce service for city pairs that had a significant volume of traffic. It is far more likely

---

<sup>7</sup> See *also* declarations of Francia Smith and Richard L. Prescott. Although the terms “proprietary” and “commercially privileged” can be viewed as distinct characteristics of the data at issue, the Service generally uses the same arguments here with respect to both. (Example: “The data are considered proprietary, because they could be used by a competitor to damage the competitive position of the Postal Service.” Whiteman Declaration (Dec. 13, 2001) at 1. This ruling adopts that approach.

that convenience, simplicity of use, cost, and related considerations drive the use of these alternatives, not knowledge of city pair delivery results.

The data in question are limited to city pairs for which service standards were changed from two days to three days. It appears that the vast majority of these city pairs will be slightly more than 650 miles apart. Nothing in the materials provided by Mr. Whiteman, or described in the statements of the other Postal Service executives, suggest that there is a contestable market for monopoly mail destined for scattered, distant, city pairs. Furthermore, the fact that the data in question reflect the performance of an independent establishment of the Government of the United States in fulfilling its task of providing monopoly service to the nation can not be ignored.

When the Government establishes a monopoly, and prevents direct competition,<sup>8</sup> it has some obligation to provide the captive users of the service with sufficient information to enable those users to know what service they are getting. If management believes the data show that service is so poor that informed customers would seek substitute services, the proper reaction is to improve the service, not mislead customers. Publication of performance data, assuming performance is satisfactory, is just as likely to discourage potential entrants, and foster stable volume.

I also have considered the Service's position that no private delivery, First-Class Mail competitor, or other transportation or delivery firms release disaggregated, market-specific days-to-deliver service performance data or point-to-point volume or service performance data. Mr. Whiteman, for example, says he is aware of no telecommunications firm that releases similar service performance data. Whiteman Declaration at 2.

*Precedent.* In case law, the prevailing view is that allegations of competitive harm are not enough to support protective conditions. More than mere assertions of harm are required; speculative claims are not enough. Courts also recognize that

---

<sup>8</sup> The Service does identify indirect competition for First-Class Mail. It is true that there are indirect substitutes for almost every commodity and service, including mail. Notwithstanding, it can not be Postal Service policy to maintain its revenues by intentionally misleading mailers into purchasing inadequate service.

important public benefits are associated with public access to documents. These include fostering respect for the rule of law, providing a check on decisionmakers and participants, and allowing greater accuracy in fact-finding. *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7<sup>th</sup> Cir. 1994). Therefore, in the court system and agency practice as well, those seeking protective conditions bear a considerable burden.

The public interest in open postal proceedings was recently reiterated in P.O. Ruling No. C2001-1/13 (September 19, 2001). The statements (including the *in camera* materials) provided here offer no persuasive evidence that point-to-point competitive information would be important. In particular, the Postal Service has offered no firm evidence that postal competitors will seize upon data related to the change in service standards at issue here to penetrate certain city-pair market segments.

*The e-bill payment argument.* E-bill payment has been discussed, to some extent, in the recent omnibus rate case. Postal Service witness Bernstein, for example, testifies in that case that "... single-piece letter mail is also subject to diversion through the use of online bill payments and bill presentments, also known as EBPP. Though this technology is not widely used, ... there is some EBBP activity and therefore some diversion of single-piece letter mail." USPS-T-10 at 52. However, witness Bernstein also says:

Electronic Bill Presentment and Payment (EBPP) has been considered the "next big thing" for several years. At this time, it has not generated as much interest as its proponents had hoped and, consequently, it has not had much of an impact on mail volumes to date.

*Id.* at 19.

With respect to the immediate controversy, the Service has not made a convincing showing that e-bill services would target individual cities or delivery areas. In fact, common sense indicates that timeliness to a specific city approximately 600

miles away would not be a marketing focus. More realistically, businesses would emphasize the convenience factor and avoidance of stamps.

*Public policy.* I have considered the Service's assertion that it provides data of this type to the Congress and the GAO only pursuant to agreements against public disclosure. While that approach may be appropriate in those oversight situations and agreeable to the reviewers, the Commission is charged with conducting a public hearing on this complaint and, assuming it finds the complaint justified, issuing a public report. Attempting to do this with relevant data, argument and analysis under seal would fundamentally frustrate this statutory charge. Also, as a policy matter, there is a strong public interest in individual consumers having accurate information about mail services. As postal patrons have access to point-to-point service standards (for example, via the Postal Service's website), it follows that they also should have access (in some form) to related, actual results.

I also have considered the Service's argument that section 410 — regarding disclosure (or not) on terms such as "good business practice" dictates — should be read as a complement to the letter mail monopoly. I agree that there is complementarity, but come to a different conclusion regarding the outcome in this situation. The notion of what constitutes good business practice, especially in the U.S., has evolved, and is not necessarily consonant with a "no disclosure" posture.<sup>9</sup> Therefore, it is reasonable to think that, if faced with criticism lodged by complaint, a private entity, in the interest of meeting a customer's concern — and possible loss of patronage — would make actual results available.

*Extent of disclosure.* Notwithstanding this finding that disclosure is warranted, it is not necessary to review city-specific data in order to perform the evaluations contemplated by complainant. Under this circumstance, the entire data set requested by the complainant need not be produced. It should be sufficient if data for applicable originating mail for the three-digit ZIP-code combinations within each Postal Service

---

<sup>9</sup> For example, performance data for private sector transportation firms currently is available at [www.bts.gov/ntda/oai/index.shtml](http://www.bts.gov/ntda/oai/index.shtml) (passenger airlines) and [www.railroadpm.org](http://www.railroadpm.org) (freight railroads).

District within the states identified by complainant are aggregated and produced, as well as, separately, the mail for the applicable three-digit ZIP-code combinations destinating within each those Districts.<sup>10</sup> Combining data for mail sent from, and received within Districts should further minimize any possibility that potential competitors could use this information to target marketing opportunities.

This decision in favor of disclosure is not intended to frustrate an institution facing daunting challenges in dealing with the aftermath of events it never contemplated having to handle. Rather, it is hoped that in fostering greater public access, greater public confidence in the Service as a national treasure will follow. Without this confidence, the Service may suffer greater damage than any business competitor could inflict.

#### RULING

1. The Postal Service's motion for application of protective conditions for the data sought in DFC/USPS-9, set forth in Reply of the United States Postal Service to Douglas Carlson Answer in Opposition to the Application of Protective Conditions to the Response to DFC/USPS-9, December 10, 2001, is not granted.
2. Disclosure of data requested in DFC/USPS-9 is granted on the terms described in the body of this ruling.

  
Ruth Y. Goldway  
Presiding Officer

---

<sup>10</sup> I recognize that the Service contends that the EXFC data are not statistically reliable in terms of performance between performance clusters. This contention may enter into a decision about how much weight should be accorded the comparisons, but is not determinative on the fundamental question of disclosure.